Supreme Court, U.S.
FILED
NOV 16 2004
OFFICE OF THE CLERK

No. 04 654

In the Supreme Court of the United States

DEBRA A. MCDONALD, EXECUTRIX OF THE ESTATE OF BARBARA ROGER,
Petitioner,

v.

UNITED STATES OF AMERICA AND COMMONWEALTH OF MASSACHUSETTS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1944, the District Court issued a Judgment on Declaration of Taking in the case U.S. v. 12,367.47 acres of land in Essex County. In 1948, the United States, (after a public outcry, especially from returning World War II veterans) enacted a statute 62 Stat. 293 (Appendix D) directing the District Court and certain Government officials to exclude from all condemnation proceedings certain lots for which (1) compensation was never paid and (2) were located in the Crane Pond Division. Under the statute, over 160 lots were removed from the taking. All parties agree and all courts found that the locus, lot 312, was never paid for and is located in the Crane Pond Division. For all time periods relevant, lot 312 was owned by the Roger family. The District Court held a compensation hearing on the Crane Pond Division lots, including lot 312. No one from the Roger family received notice of the compensation hearing. Notice was posted in the Clerk of Court's office; however, the United States did not give personal notice to the Rogers, in spite of the fact that the United States knew the Rogers' address and further knew that the Rogers maintained a residence on the property and were listed on the tax rolls of the Town of Groveland, Massachusetts. In 1959, some, but not all property in the Crane Pond Division was sold to the Commonwealth of Massachusetts. The Commonwealth claims that Lot 312 was conveyed but, at no time, did anyone occupy or possess lot 312 except the Roger family. The Roger family has paid real estate taxes on the property from at least 1944 to the present. The Roger family brought this action to clear its title. Both the District Court and First Circuit Court of Appeals ruled that the action is barred by Rule 60.

Four questions are presented:

1. What is the remedy for a landowner who has a statutory defense to a taking, who retained exclusive possession of the property for over fifty (50) years after the taking, including paying taxes, and who does not receive notice of the compensation hearing so he can raise a compelling statutory defense?

2. If a statute mandates an action, what is the remedy if a court does not order the mandated action?

3. What is the remedy where the District Court holds a compensation hearing without personal notice to the landowner who is easily identifiable from public records and who has defenses to the taking?

4. If the United States Congress passes a statute which forbids the payment of compensation, must the land be returned to the landowner?

LIST OF PARTIES

Debra A. McDonald, Executrix of the Estate of Barbara Roger, Petitioner.

The United States of America and the Commonwealth of Massachusetts, Intervenor, Respondents.

12,367.47 Acres of Land, Defendant.

The Commonwealth of Massachusetts is claiming title by virtue of a deed from the United States which was executed more than ten (10) years after passage of 62 Stat. 293.

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OPINION BELOW

The opinion of the United States Court of Appeals is included in the Appendix as Appendix B. The First Circuit affirmed the decision of the United States District Court for the District of Massachusetts. See Appendix C.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The First Circuit's decision was rendered on May 25, 2004. The petition for panel rehearing and for panel rehearing with suggestion for Rehearing En Banc was denied on August 24, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States.

Pub. L. No. 80-579. 62 Stat. 293 passed in 1948 hereinafter referred to as 62 Stat. 293.

STATEMENT OF THE CASE

1. In 1944, the United States District Court entered a judgment on Declaration of Taking in this case entitled, "United States vs. 12,367.47, Misc. Civil No. 7010. That taking included lot 312.

The returning World War II veterans raised a clamor about losing their land. See legislative history of 62 Stat. 293. The Commonwealth of Massachusetts moved to dismiss

the action. Ultimately, a compromise was reached whereby certain lots not paid for would be excluded from the taking and certain lots that were paid for could be repurchased by the condemned landowner.

This compromise was codified in 62 Stat. 293. 62 Stat. 293 was passed by Congress on June 3, 1948. Lot 312 was never paid for and was located in the Crane Pond Division and therefore, by the terms of 62 State. 293, Lot 312 was required to be excluded. 62 Stat. 293 §2b states in part:

62 Stat. 293

"An Act To reduce in area the Parker River National Wildlife Refuge in Essex County, Massachusetts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Parker River National Wildlife Refuge in Essex County, Massachusetts, *is hereby reduced in area by elimination therefrom these portions of the refuge designated and known as the Crane Pond*, Downfall, and Mill Creek Areas, and the Secretary of the Interior is *authorized and directed* to dispose of all of the interests of the United States in such areas in accordance with the provisions of this Act. ...

(b) With respect to such other lands as lie within the three areas designated in section 1 and are included in the condemnation proceeding or proceedings referred to, and compensation for the taking of which has not been paid to the prior owners thereof, the Attorney General of the United States is

authorized and directed to *exclude* the same from the condemnation proceedings entitled "United States v. 12,367.47 Acres More or Less of Land Situate in Essex County, Massachusetts, Civil No. 7010, in the District Court of the United States for the District of Massachusetts", or any other condemnation proceeding instituted by the United States for the acquisition of lands for the Parker River National Wildlife Refuge, in accordance with the provisions of the act of October 21, 1942 (56 Stat. 797; 40 U.S.C., Supp. 258f*), within ninety days following the date of enactment of this Act* or within such additional period as the court in such proceeding may determine to be necessary to effectuate the purposes of this Act". ...

Approved June 3, 1948" (emphasis supplied)

In short, Lot 312 was required to be excluded from the taking but no formal exclusion was ever entered by the District Court.

In 1956, the United States held a compensation hearing on lots in the Crane Pond Division. Notice of the hearing was accomplished by posting in the Clerk of Court's office. No one in the Roger family was given personal notice of the compensation hearing.

At the hearing, the owner of Lot 312 was defaulted for not appearing, a compensation amount was set and the Court did not rule on whether or not Lot 312 should be excluded as required by 62 Stat. 293.

In 1959, the United States sold certain lots in the U.S. v. 12,367.47 acres taking to the Commonwealth of Massachusetts.

In July 1975, the Roger family recorded a plan at the Essex South District Registry of Deeds showing it owned all of Lot 312.

2. In 1988, the District Court excluded lot 333 from the taking. The United States never paid for Lot 333 and it was located in the Crane Pond Division. The Commonwealth asserted title to lot 333 by virtue of the 1956 deed. The Massachusetts Land Court ruled that the Commonwealth had no title to lot 333. Neither lot 333 nor lot 312 are identified as lots conveyed to the Commonwealth in the plan that accompanied the 1956 deed.

3. In this case, the statute, 62 Stat. 293 removed lot 312 from the taking. All parties agree that Lot 312 is located in the Crane Pond Division and the United States never paid anyone for it. In spite of these findings, the First Circuit ruled even though the harm suffered by the Petitioner is unfortunate, the petitioner has no remedy. Any remedy was barred by Rule 60(b) of the Federal Rules of Civil Procedure.

REASON FOR ALLOWANCE OF THE WRIT

This writ should be allowed because the lower Courts did not provide a remedy for the confiscation of the Roger property. Specifically, the Roger family has, at all times, possessed this property, paid taxes upon it (and lived on it). The District Court had no power to hold condemnation proceedings after 1948. If the Roger family had received notice of the compensation hearing (in 1956), the property would have been removed from the taking. 62 Stat. 293. The government's failure to give notice to the Roger family prevented the Roger family from insisting on their rights at the compensation hearing. The Roger family's reliance on 62 Stat. 293 was reasonable and justified as it stated clearly that

there could be no condemnation proceeding against lots like Lot 312. The Roger's family had, over the course of fifty (50) years, uninterrupted possession of Lot 312 and held themselves out as owners of the property. The government's position should not improve nor should the Roger family lose rights because of the failure of the United States to give notice to the Roger family of the compensation hearing.

Furthermore, neither the United States nor the Commonwealth ever asserted a right of possession of this land. They should not now be allowed to do so.

Another reason for allowance of the writ is to fashion a uniform remedy for a landowner whose property is taken and the landowner is not given notice of the compensation hearing. The Circuit Court of Appeals are divided as to the remedy available to landowners if the landowner is not given notice of the compensation hearing.

Review is also necessary because the First Circuit failed to recognize that the jurisdiction of the District Court to hold condemnation proceedings regarding lot 312 in the case of U.S. v. 12,367.47 acres was eliminated by 62 Stat. 293. The decision of the First Circuit is inconsistent with a long line of Supreme Court cases which give "immediate effect to statutes that alter a court's jurisdiction." See Republic of Austria v. Altmann, ____ U.S. ____ 2004 Scalia concurring.

In this case, the District Court and the First Circuit ignored the legislative compromise (62 Stat. 293) which removed certain lots from condemnation proceedings. The Court's review is necessary so that the compromise achieved by citizens in their appeals to Congress are followed.

Given that the District Court held condemnation proceedings after the statute was passed in 1948, it should have provided the landowner with personal notice of these proceedings including the compensation hearing that was held in 1956. Over 160 lots were excluded between 1948 and 1961. One lot was excluded in 1988. It is clear, that had the Roger family received notice of the 1956 proceedings, they could have successfully addressed them and the land (lot 312) would have been removed from the taking.

I. THE ROGER FAMILY'S DUE PROCESS RIGHTS AS SET OUT IN THE STATUTE 62 STAT. 293 WERE VIOLATED WITHOUT NOTICE TO THE ROGER FAMILY.

The process due to the Roger family is set out in 62 Stat. 293. It required exclusion of Lot 312. Lot 312 was never formally removed from the taking as required by 62 Stat. 293. The District Court ruled that failure to give the Roger family personal notice of a compensation hearing is not a denial of due process. The District Court is in error. The First Circuit said essentially, even if the result is unfortunate, it is too late, pursuant to Rule 60 to correct any injustice. The First Circuit is also in error. The statute 62 Stat. 293 directly affects the jurisdiction of the District Court. It states explicitly that, ninety (90) days after June 3, 1948, lots like Lot 312 can no longer be subject to any condemnation proceedings. Congress clearly has the power to control the jurisdiction of the District Court. Hallowell v. Commons, 239 U.S. 506, 509 (1916). Congress removed the District Court's power to act on lot 312. Therefore, its jurisdiction over lot 312 was eliminated.

In the case of Republic of Austria v. Altman, ____ U.S. ____ (2004), Justice Scalia stated in his concurring opinion,

that "I noted our 'consistent practice of giving immediate effect to statutes that alter a court's jurisdiction." I explained this on the grounds that 'the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power . ...."

Therefore, the District Court had no power to issue any Judgment regarding lot 312 after 1948 (other than to exclude it). Rule 60 cannot be a bar to a just result if the Court does not have subject matter jurisdiction to enter the erroneous judgment.

II. REVIEW OF THIS CASE IS NECESSARY BECAUSE THE DISTRICT COURT AND FIRST CIRCUIT DID NOT PROVIDE A REMEDY FOR NOT PERFORMING THE ACTIONS MANDATED BY 62 STAT. 293.

The issue in this instance is what is the remedy when the District Court does not adhere to a statute which mandates certain action.

In Bauman v. Ross, 167 U.S. 548 (1897), an eminent domain statute required the exclusion of certain land from a taking within a certain time period. The Supreme Court held that once that time period expired, the land was deemed excluded.

In a similar case, though not about eminent domain, Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003), the Supreme Court held that where a mandatory time period expires, and there is no sanction in the statute, the remedy is to perform the mandated action.

The concern raised by Justice Scalia in the Barnhart case is not present here. Justice Scalia stated that because an action was required to be accomplished within a certain time period the court could not order it done after the expiration of that time period. 62 Stat. 293 specifically allows the District Court to extend the deadline. In 1949, the District Court extended the date for exclusion indefinitely. The District Court excluded lot 333 in 1988. Lot 333 had never been paid for and was located in the Crane Pond Division.

The First Circuit's decision is in error and the mandated action (exclusion of lot 312) should now occur.

III. REVIEW IS NECESSARY BECAUSE OF A CONFLICT AMONG THE CIRCUITS AS TO THE REMEDY WHEN A LANDOWNER DOES NOT RECEIVE NOTICE OF A COMPENSATION HEARING.

The case of Walker v. City of Hutchinson Kansas, 352 U.S. 112 (1956) requires personal notice of a taking upon a landowner. The case of Catlin v. U.S., 324 U.S. 229 (1945) allows a condemned landowner to challenge the statutory basis at a compensation hearing.

The question presented in this case is this: What is a landowner's remedy when the Court holds a compensation hearing, does not give the landowner personal notice and the landowner has a defense to the taking.

Clearly, if the Rogers were given notice of a compensation hearing, the court would have been constrained to exclude lot 312 from the taking in accordance with 62 State. 293. It did, in fact, exclude one hundred sixty (160) other lots at various times in the litigation.

There is a dispute among the Circuits as to how to address that lack of notice of the compensation hearing.

The remedy set out in this case by the First Circuit for the United States' failure to provide a landowner notice of a compensation hearing, is that the landowner's rights to a compensation hearing and to challenge the statutory basis to a compensation hearing can be lost by reason of Rule 60 of the Federal Rules of Civil Procedure.

The First Circuit addresses this issue in two other cases, United States v. 125.2 acres, 732 F2d 239 (1984) and United States v. Lombard, 356 F3d 151 (2004).

In both of these cases, landowners claimed that they were not given personal notice of the taking. In the 125.2 acres case, the First Circuit declined to upset the taking and remanded this case back for a compensation hearing on damages only. The Lombard case refused to upset the taking, ruling that the state court procedures, which did not include personal notice to potential aggrieved landowners, were sufficient. The Fourth Circuit agrees with the First Circuit, United States v. Fulcher, 632 F2d 278 (1980).

The Seventh Circuit has held that if a potential landowner is not included in a taking, the United States takes no title at all. United States v. 88.28 acres of land, 608 F2d 708 (1979). In other words, if a landowner is not made part of the compensation proceedings, he is not bound by the result. Id.

The Fifth and Eighth Circuits take the position that due process requires that the landowner be given personal notice of a compensation hearing including the right to challenge the statutory basis for the taking set out in Catlin v. U.S., 324 US 229 (1945) before any judgment can bind the landowner.

The Fifth Circuit decision is found in United States v. 194.08 acres of land, 135 F3d 1025, Fifth Cir. (1998) and the Eighth Circuit is United States v. Herring, 750 F2d 669 (Eighth Circuit 1984). The Herring decision set out the three alternatives mentioned above, namely; (1) the landowner's right to a compensation hearing can be lost and the government title is indefeasible. (2) The government takes no title if the landowner is not given personal notice; and (3) the government takes title subject to the compensation hearing in which the landowner can challenge the taking. The Eighth Circuit concluded that the United States takes title upon the Judgment of Taking but that due process requires that the landowner be given personal notice of a compensation hearing with the ability to raise an defense to the taking at that hearing. Id. at 674. The United States title is not indefeasible until the landowner has had notice and the opportunity for a hearing. Id.

The First Circuit's remedy for failure of the government to provide notice of a compensation hearing was to rule that no compensation hearing could be held. This result is inconsistent with the law as set out by the Fifth, Seventh and Eighth Circuits. Furthermore, the First Circuit itself has held that judgments that work denial of due process, should not be protected by Rule 60. See United States v. Boch Oldsmobile, Inc., 909 F2d 657, 661 (1st Cir. 1990).

The Rogers would benefit from a hearing, as the statutory basis for the taking was repealed before any compensation hearing was held.

IV. REVIEW IS NECESSARY BECAUSE THE LAND MUST BE EXCLUDED SINCE 62 STAT. 293 FORBIDS THE PAYMENT OF COMPENSATION.

62 Stat. 293 required the District Court to remove lot 312 from all condemnation proceedings. Consequently, the District Court had no power to set a compensation amount. Lot 312 had to be removed from the taking and returned to the landowner because the United States had no power in law to pay for lot 312.

CONCLUSION

Review is necessary because the First Circuit did not give the Roger family the rights due them under the Fifth Amendment and the due process rights set out in 62 Stat. 293. Neither the Commonwealth of Massachusetts, nor the United States Government, gave notice to the Roger family that their right of possession of Lot 312 was in jeopardy. Neither the United States, nor the Commonwealth of Massachusetts attempted to possess this land.

No government should be able to confiscate the land without notice, without compensation and without following the United States Statute 62 Stat. 293.

Alternatively, review of this case is necessary to resolve a conflict among the Circuits as to the remedy of landowners whose land is condemned, who have a reasonable chance to defeat the taking at a compensation hearing, and who have not been given personal notice of the compensation hearing to address the government's ability to take their land.

The First Circuit is in error when it ruled that the United States has the power to deprive these citizens of their land in light of a statute which prohibits that exact result. If the First Circuit is correct that the District Court retained jurisdiction, then personal notice was required and a compensation hearing should now be held. Petitioners request that this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03 -2354

[Filed August 24, 2004]

UNITED STATES, Plaintiff, Appellee,	)
COMMONWEALTH OF MASSACHUSETTS, Intervenor, Appellee,	)
v.	)
12,367.47 ACRES OF LAND, Defendant,	)
DEBRA A. MCDONALD, EXECUTRIX OF THE ESTATE OF BARBARA ROGER, Defendant, Appellant.	)

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch,
Lipez and Howard, Circuit Judges.

ORDER OF COURT

Entered: August 24, 2004

The petition for rehearing en banc, which we construe as including a petition for panel rehearing, having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Richard Cushing Donovan, Clerk.

By: _____
Appeals Attorney.

[cc: Messrs: Ross, Ross, Teague, Dick, Ms. Connolly and Ms. DelBono]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03 -2354

[Filed May 25, 2004]

UNITED STATES,
Plaintiff, Appellee,

COMMONWEALTH OF MASSACHUSETTS,
Intervenor, Appellee,

v.

12,367.47 ACRES OF LAND,
Defendant,

DEBRA A. MCDONALD,
EXECUTRIX OF THE ESTATE OF BARBARA ROGER,
Defendant, Appellant.

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch,
Lipez and Howard, Circuit Judges.

JUDGMENT

Entered: May 25, 2004

The district court's judgment of August 27, 2003, is affirmed essentially for the reasons the court gave from the bench. See ist Cir. R. 27(c). We previously rejected the appellant's subject matter jurisdiction argument in United States v. Esty, 1st Cir. No. 03-1701 (Feb. 18, 2004). Although the circumstances of this case are unfortunate, we agree with the district court that a wait of thirty-some years is "overwhelming enough to take it outside of the confines of Rule 60(b) ."

By the Court:

Richard Cushing Donovan, Clerk.

By: _____
Chief Deputy Clerk.

Certified and Issued as Mandate under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk

_____
Linda Barry, Deputy Clerk

Date: August 31, 2004

[cc: Messrs: Ross, Ross, Teague, Dick, Ms. DelBono and Ms. Connolly]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-11021-DPW

[Filed August 27, 2003]

UNITED STATES OF AMERICA Plaintiff,	)
Commonwealth of Massachusetts, Intervenor, Plaintiff	)
v.	)
12,367.47 acres of land, more or less located in Essex County, Massachusetts, Debra A. McDonald, Executrix of the Estate of Barbara Roger, Defendants	)

JUDGMENT

WOODLOCK, D.J.

In accordance with the Court's Allowance of the Motion of the Commonwealth of Massachusetts for Summary

Judgment, and Denial of the Motion for Summary Judgment of the claims of Debra A. McDonald, as Executrix of the Estate of Barbara Roger with respect to Lot 312, for the reasons set forth on the record in open court this date, it is hereby ORDERED, ADJUDGED, AND DECREED:

Judgment for the Commonwealth of Massachusetts against the defendant Debra A. McDonald, as Executrix of the Estate of Barbara Roger with respect to Lot 312.

By the Court,

Dated: August 27, 2003 /s/ _____

Rebecca Greenberg
Deputy Clerk

* * *

[p.25]

ORAL REASONS FOR JUDGMENT

BY THE COURT:

This case raises a theme in variation on the decision that I made in the Esty case. Here, we have -- unlike Esty -- someone who paid taxes over a period of time on property that was taken in 1945 from him and his heirs. This is an individual who clearly received notice of this taking back in 1945. That isn't in dispute. There was a supervening statute and we've had a discussion with respect to this statute which was designed in 1948 to reduce the area taken in the Parker River National Wildlife Refuge by permitting the exclusion of certain pieces of property. The record is unclear about whether or not there was any contemporaneous notice, specifically to the heirs of Roger, concerning this exclusion statute. And the argument has been made to me, as it was made in Esty, that the statutory right of exclusion continues essentially in perpetuity, that until and unless someone receives actual notice Concerning that exclusion, that individual may come back in court and seek to have overturned the property transactions which have flowed from the taking. I don't accept that view of the statute, as I think I made clear in Esty.

But there's something more fundamental [p.26] involved here. And that something more fundamental, which on reflection I did not fully address in Esty, is the implications for Rule 60(b), because that's really what we're talking about here: Can we vacate a judgment that has been outstanding for

a period of time? The relevant provision of Rule 60 is Rule 60(b) (6), which does not have a specific time limit on it and permits in exceptional circumstances the vacation of judgments. It's important to note that within the First Circuit, there is a rather austere view about the availability of Rule 60(b). And while in some circuits, Rule 60(b) motions have been granted liberally, the First Circuit adheres to what I call the harsher approach that requires that the circumstances be truly exceptional given the countervailing interests in the finality of judgments, an observation made in a variety of cases, one of which is Davila-Alvarez at 247 F.3d 58, particularly the language at 63 through 64, a First Circuit case from 2001. This is not such an exceptional case. In point of fact, here, we have the heirs of Roger, the person who received notice that his land had been taken, asserting some 25 years later an interest in the property, a dispute concerning the property, and an intention to consult legal counsel with respect to their rights on this property.

[p. 27] The letter of March 12th, 1967, says it all. Lawrence Roger, the heir or successor of John Roger, says that the earlier government letter explaining what's transpired with respect to the property doesn't satisfy him and it has been forwarded to his attorney. Waiting another 25 years -- I guess it's 35 years -before actually coming to court --

MR. ROSS: Yes. Thirty-five.

THE COURT: Time really passes along here.

BY THE COURT:

Waiting 25 years is a lot, but 35 years is overwhelming, overwhelming enough to take it outside of the confines of Rule 60(b).

If there was an error about applying the statute -- and I don't believe there was -- that is the statute of exclusion -- it was expressed in a judgment of which the heirs or successors of the person whose property was taken had an awareness and they took no timely formal action within this Court to challenge or modify the judgment.

Now, I am aware that the United States Attorney's Office at various points has taken -apparently without a good deal of information -provisionally inconsistent positions. They took it in Esty until the Commonwealth raised the problem. [p. 27] They were prepared in Prescott to compromise. But the issue now is phrased and framed in purely legal terms. And in purely legal terms, I see no basis to vacate or otherwise modify the several judgments entered in this case which have the effect of closing off the rights to exclusion of property properly taken by the United States and thereafter sold.

Now, I can fit this into other related forms of finality concern. The doctrine of laches seems to me to be fully available here. Similarly, the statute of limitations, which would have barred action by the claimant against the United States, provides a cutoff. But I have chosen to ground my action on the arguably most capacious and hospitable form of revisiting judgments, Rule 60(b), to analyze this case in order that I give the claimant defendant, now the estate of Ms. Roger, the broadest scope for asserting her claims.

Even if there had been -- and I don't think there was -- a due process violation, at some point -and I don't have to cut this too fine -- there is a interest in finality. And an interest in finality is particularly critical in the area of land and real property, something recognized by the Supreme Court repeatedly. The alternative is that takings remain open for revisitation, modification, and disruption in [p.28] perpetuity.

I don't believe that that is the law under the exclusion statute. But in any event, it's not the law of judgments as interpreted by the First Circuit in what, as I've said, is an austere view. But even if one didn't take the austere view, even if one were as sympathetic as one could be and read Rule 60(b) as an invitation to periodic re-analysis of long-standing judgments, I don't see anything to suggest that a claim such as that made by the estate of Barbara Roger may be upheld.

And, so, for those reasons, I will grant the Motion for Summary Judgment of the Commonwealth and deny the Motion for Summary Judgment of Debra McDonald, the Executrix of the Estate of Barbara Roger.

This statement of reasons is dictated into the record to give the parties a prompt resolution of the case. I reserve the right, obviously, to tidy it up if it becomes necessary. But I think it captured the essence of my determination with respect to this.

Is there anything further or any further findings that the parties wish?

MR. TEAGUE: No.

THE COURT: Okay. Thank you very much. We'll be in recess.

RECESSED AT 3:45 P.M.

[p.30]

CERTIFICATE

I, PAMELA R. OWENS, Official Court Reporter, U. S. District Court, do hereby certify that the foregoing is a true and correct transcription of the proceedings taken down by me in machine shorthand and transcribed by same. I certify that the transcript fees charged and the page format used by me comply with the requirement of this Court's court reporter plan and the requirements of the Judicial Conference of the United States.

/s/ _____
Pamela R. Owens

* * *

APPENDIX D

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

62 Stat. 293

An Act

To reduce in area the Parker River National Wildlife Refuge in Essex County, Massachusetts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Parker River National Wildlife Refuge in Essex County, Massachusetts, is hereby reduced in area by elimination therefrom these portions of the refuge designated and known as the Crane Pond, Downfall, and Mill Creek Areas, and the Secretary of the Interior is ***authorized and directed*** to dispose of all of the interests of the United States in such areas in accordance with the provisions of this Act ...

(b) With respect to such other lands as lie within the three areas designated in section 1 and are included in the condemnation proceeding or proceedings referred to, and compensation for the taking of which has not been paid to the prior owners thereof, the Attorney General of the United States is ***authorized and directed*** to ***exclude*** the same from the condemnation proceedings entitled "United States v. 12,367.47 Acres More or Less of Land Situate in Essex County, Massachusetts, Civil No. 7010, in the District Court of the United States for the District of Massachusetts", or any other condemnation proceeding instituted by the United States for the acquisition of lands for the Parker River National Wildlife Refuge, in accordance with the provisions of the act of October 21, 1942 (56 Stat. 797; 40 U.S.C., Supp. 258f), ***within ninety days following the date of enactment of this Act*** or within such additional period as the court in such proceeding may determine to be necessary to effectuate the purposes of this Act" ....

Approved June 3, 1948